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# TAKING SOUNDINGS

BY DAVID JAYNE HILL

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No one familiar with the political development of the United States can entertain a doubt that radical changes have occurred in the ideas and sentiments of the American people. In the December number of this REVIEW one aspect of these changes was briefly considered in an article on "The Crisis in Constitutionalism." Comments received on that subject confirm the impression that this is, in reality, the storm-center of contemporary movements—disclosing a conflict between fixed principles, on the one hand, and spontaneous impulses, on the other, in which the participants themselves do not always fully realize the rôle they are playing or the motives that actuate them.

In the period when our government was established it was the common conviction that there are some individual and personal rights so clear, so undeniable, and so worthy of protection that they should receive the most trustworthy guarantees that could possibly be accorded to them. In this spirit the early State Constitutions were conceived, as, for example, that of Massachusetts, which declared its object to be the establishment of "a government of laws and not of men"; and later the Federal Constitution, as finally agreed upon, the people insisting upon the explicit recognition of these rights in their fundamental law. By this they meant to set limits to every form of governmental power which might ever tend to invade these rights. Thus, for the first time in the history of the world, life, liberty, and property were intended to be placed under the protection of a law so inclusive that it would in the future bind all executives, all legislatures, and all courts.

A high authority in such matters in our country has suggested, with an evident intention of disparagement, that "the Constitution of the United States has been made under

the dominion of the Newtonian theory "; and adds that the men of that period " represent Congress, the Judiciary, and the President as a sort of imitation of the solar system." " The Constitution," he concludes, " was founded on the law of gravitation," which he considers purely mechanical.

There is truth in this simile; but it certainly does not justify the inference that, since " government is a living thing " and not merely a machine, " it is accountable to Darwin, not to Newton "; for whatever the biologic laws may be, if indeed it be possible to state them clearly, they have not superseded or rendered superfluous the law of gravitation. All living organisms that ever were, are, or are to be have been and will be subject to it; and, however varied, fecund, and marvelous the process of natural evolution may prove to be, we shall forever be obliged to go back to Newton and his *Principia* for an intelligible theory of the universe. In like manner, we shall be compelled to return to the great principles of human justice underlying the Constitution for a defensible theory of the State. We may have changed, but the law of gravitation still controls our footsteps; society may have changed, but the great principles of ethics are its only sure foundation; our ideas may have changed, but the laws of logic, by which alone they may be consistently co-ordinated, still remain unaltered.

Nevertheless, the notion that the present is a Darwinian rather than a Newtonian age is one full of illumination; but this notion does not warrant us in believing that Nature has changed her laws, or that these laws are changeable. It means simply that in our minds the process of change is receiving a degree of attention greater than in the past, and that by centering our thought upon the idea of transformation itself we may be losing sight both of the conditions upon which beneficial changes may depend and the results that may follow from our insistence upon radical action. Although it is true that we live in an age when the evolutionary process has taken a foremost place in our thoughts, it is important to remember that, so far as we know anything about it, it has never been a rapid process, and, in the Darwinian sense at least, has been an unconscious adjustment to natural conditions rather than a swift and purposeful transformation.

It is precisely here that the substitution of experiment for experience presents grave dangers. If we truly wish to be

wise, or—should that be more agreeable—if we wish to be rigorously scientific, what we should be concerned about is to know precisely why and how our existing political institutions came into being, rather than to engage in the exploitation of extemporized schemes for destroying them. In our country the danger of erring in this matter is greater than in almost any other, for the reason that we have less of the historic sense and more of the spirit of initiative than any other people. In private matters, and even in private associative action, this may be of little consequence; for failure to justify our theories by achievements involves nothing more serious than private loss or disappointment. In public matters, however, the substitution of impulses for deliberate reflection, of unrestrained action for measured powers, and of improvised schemes for settled principles becomes a danger of incalculable magnitude.

Those of us who distinguish between reason and emotion, between reflection and impulse, between world-experience and spasmodic action, believe that a fundamental law forbidding class, sectional, and inspirational legislation is the indispensable guarantee of personal liberty and the necessary basis of true social justice. We are opposed, openly and fearlessly, to those who, for private or alleged public reasons, would ruthlessly sweep it away. We are of the opinion that a non-Newtonian and otherwise undisciplined state of mind is a dangerous one for the well-being of the Republic. We freely admit that there are fewer purely personal motives for defending the work of the past than there are for initiating new and ill-considered schemes of public action. We do not forget that novelty pleases, and that conditions imposed by the past are often felt to be at fault when our misfortunes are in reality to be attributed to other causes. We are aware that those who seek the support and admiration of their fellow-citizens find it to their advantage to offer to them a Promised Land flowing with milk and honey. We realize also that the smug contentment of those who feel themselves beyond the reach of personal harm, and who say in their souls, "After us the deluge," constitutes an absolutely negligible quantity either for promoting needed reforms or resisting public evils. It is from the ethically minded and public-spirited men and women of the country alone that any interest in such questions is to be expected, or upon whom any dependence for unselfish action can be

placed. And yet it is worth while to take soundings, and to point out to those who have an open mind the perils by which we are confronted, and especially to leave on record for the future the fact that blindness and inertness were not universal in the period of demolition, if such a period shall follow, when the great work of our fathers is to be undone. It may be, after all, when public attention is turned to the facts, that the efforts of our time to wipe out and utterly efface the distinction between a fundamental law and ordinary legislation, and to place absolute and unlimited power in the hands of legislative majorities—or even, perchance, in the hands of popular minorities afforded control by the division of their fellow-citizens over minor matters—may yet be happily averted. But this cannot be, unless the danger is realized and united action is substituted for indifference.

The first and most important reflection to occupy our attention here is the fact that, in the observations of the press and in the private letters that have come to the writer regarding the “Crisis in Constitutionalism,” no one has denied that there is a widespread disposition to render easier the modification of the Constitution of the United States; yet no one has cited a single social reform worthy of serious consideration that necessitates a change in our fundamental law, or which cannot be carried into effect without a change. In this case the process of evolution is sought to be facilitated solely for its own sake. In brief, we should change our fundamental law, simply because it *is* a fundamental law, which may some time stand in the way of what a legislative majority may yet be impelled to do.

What is the nature of this contemplated legislation that finds itself obstructed by the Constitution? Strictly speaking, it is as yet too much in the state of fermentation to declare itself distinctly. If some of the purposes in view were clearly articulated, the radical nature of this legislation would be too apparent. The time has not come for a disclosure of its terms. Already the right of transmitting property by inheritance has been brought in question, and the right of the individual to possess more than a certain limited amount of wealth has been denied in high quarters. No one has ventured to draw the line at a definite point, either as respects possession or inheritance; or indicated any principle upon which the line could be drawn, where it

should begin, or where it should end. The one thing most certain is, that it would not end where it began.

When duly analyzed, it becomes apparent that in the process of social evolution a new conception of social justice has been formed. It has not come into being by any process of reasoning. It is a child of the emotions. Our fathers demanded just and equal laws. The modern theorist replies, "Equal laws, laws which apply alike and equally to all men, cannot be just." What is demanded is not "equal laws" but "laws of equalization." Equality of law merely gives the prize to industry, thrift, enterprise, and economy. It creates differences, and bestows a premium upon strength, skill, and talent. It is essentially aristocratic. It recognizes, promotes, and rewards superiority. It condemns and indirectly punishes incapacity. Under equal laws men cannot be equal. What is demanded is equality of condition. This can be attained only by new laws, laws which will distribute to each from the common stock according to his needs.

Two sophisms underlie this demand. The first is a new theory of the nature of wealth. The idea that the individual creates wealth and may rightly possess it, it is affirmed, is an erroneous eighteenth-century idea entertained by the founders of the American Republic. Wealth, on the contrary, is a social product; and, therefore, rightly considered, a social possession. Value is a relation between supply and demand. It is the presence of others that gives value to our possessions. Without them, there would be no value.

Plausible and seductive as this reasoning may seem, it is plainly founded upon misconception. Society as a whole never yet initiated, conducted, or brought to successful achievement any industrial process or any wealth-producing activity. It is always an individual, or a group of individuals, that does these things. It is, therefore, a wholly unwarranted assumption to affirm that the totality of wealth rightfully belongs to society as a whole. It belongs to those who by their enterprise, industry, and skill have produced it, or who by their abstinence from consuming it have kept it in existence.

The second sophism underlying the demand for unrestrained legislation is the assumption that, since society as a whole is the rightful owner of everything, there exists no individual right that is not based on social permission.

The origin of this conception of right, considered historically, is evident. All rights and all public powers were formerly centered in the ruler, who could grant them to others according to his good pleasure. When the ruler was a prince, the formula of government was, "The will of the prince is law." Now that the people have become the rulers, the formula has become, "The will of the people is law." The people may bestow and the people may take away, according to their good pleasure. In the passage from monarchy to democracy this conception of sovereign omnipotence has merely been transferred, but it has not been changed. Popular political thinking is still, in this respect, as crude and as fallacious as it was in the Middle Ages.

What constitutional government intended to do was to end forever the idea that there is any rightful depository of unlimited power; in brief, to destroy the error that *any one's will is law*, and to establish the principle that law is not a product of will, but a system of rules for the regulation of will derived from the authority of reason.

The problem which the framers of constitutions encountered was not merely the distribution of power, but the nature of public authority. Whence proceeds the right of an institution calling itself the State to impose its commands upon the individual members of human society? The answer given was, "There is no rightful authority, and no actual authority should be recognized, to deprive an individual of his inherent rights to life, liberty, and property." The State itself is subject to law—to its own fundamental law—by which it and all its organs are bound to respect and to safeguard the inherent rights of its citizens. If it should cease to do that, it would cease to be the State.

It is clear, therefore, that there is an inherent and inevitable antagonism between the idea that legislative power should be unrestricted and the idea of a fundamental law limiting the statutory power.

Let us note, then, the array of avowed purposes actuating radical constitutional changes and pressing for an easier method of modifying our fundamental law. I quote a series of public statements promulgated and advocated by persons more or less highly placed, and in some instances representing hundreds of thousands, and even millions, of supporters:

The Constitution of the United States was framed by and in the interests of a property-possessing class.

Property is rightfully the possession of society as a whole; when detained in private hands it becomes a permanent reward for a temporary service, or for no service at all.

The pretended right to transmit property from one generation to another is not a natural right.

Corporate properties should be valued according to their present cost of physical reproduction, and may rightly be taken over by the people upon that valuation.

The remuneration of the worker will be determined either by deeds or by needs, as may hereafter be decided; *but most certainly not* upon the basis of allowing him a reward according to the importance of his industrial product.

Employers, as such, have no right to exist. The aim of the employed should be a practice that will enable workers to assume, as the return for their labor, *the full control* of the various industries.

The idea of inalienable natural rights is an erroneous eighteenth-century conception. Men have *no rights*, except what society concedes to them by law.

No court should be permitted to nullify any act of a legislative body on the ground that it is unconstitutional.

Let it not be imagined that these are merely the sporadic expressions of wholly irresponsible persons, or the incoherent mutterings of discontented men. Some of these doctrines have been heard in sermons, some have been clipped from widely circulated periodicals, some have been quoted from serious books, and others are recorded as the solemn resolutions of influential bodies.

If we were engaged in a polemic rather than a merely expository task, it would be proper to specify the sources of these utterances and to make an attempt to refute them; but the present purpose is merely to indicate the elements of the leaven which is at present working among the people and affecting public opinion. If these propositions were merely academic theses designed to illustrate dialectic skill, or innocuous private judgments, like opinions regarding the beauty or meaning of a picture, they might well be passed over in silence; but, on the contrary, they are all of a pragmatic nature, involve the future status and interests of our fellow-citizens, and contemplate legal changes through public action. They supply precisely the kind of materials sought by those who, while aiming first of all at their own self-advancement, desire to appear as the advocates of forms of progress from which their followers may imagine themselves likely to receive a personal benefit.



Unfortunately some of these proposals assume a close connection with the aims of a pure and high-minded philanthropy which serves to conceal their sordid side and imparts to them a glamour of righteousness which they do not really possess. Our sympathies with poverty and suffering and our antipathy to cruelty and extortion are appealed to, and we are led to believe that nothing can be wrong which brings to terms those who have revolted our consciences by their avarice or inhumanity. We are not, in fact, called upon to spare the feelings of those who themselves spare neither manhood nor womanhood nor childhood in their expedients for extortion. But, on the other hand, we should be very untrue to the cause of humanity, as well as to the cause of justice, if, in our zeal to lift up the downtrodden and to support the weak, we should sweep away the basic guarantees upon which the whole edifice of justice is erected. Loyalty to humanity lays upon us a larger duty than the immediate destruction of some single evil, however monstrous it may seem to us. To cleanse and purify the temple, we do not need to create a conflagration; for, so far as just and needed social reforms are concerned, there is probably not a single one that requires for its accomplishment any radical change in a system of government by which we have progressively exterminated so many evils.

Nor can it be fairly asserted that constitutional government, as understood by our fathers, is of interest chiefly to the property-possessing class—particularly the large property-possessing portion of society. It has never been its aim to protect any particular class to the disadvantage of another; but, on the contrary, to see to it that there be no insurmountable barriers to block the way of human aspiration, with the result that there are few fortunes in our country the foundations of which were not laid by men who once worked for wages. As for the excessively great fortunes, their possessors are the least likely to be affected by any radical legislation, for they will always find a safe asylum in which to meditate upon their woes. It is the wage-earners and the organizers and administrators of wealth-producing enterprises whose hopes are threatened by encroachments upon our constitutional guarantees; for the prosperity of the great mass of our population is dependent upon a mutual confidence that industry will be suitably rewarded and enterprise enabled to prosper. Nothing could so effectively

check and permanently embarrass the creative forces of the country as the thought that the results of industry and enterprise will be exposed to future expropriation.

What is to become of superior skill or of superior power to organize and manage great industries, if laws of equalization are henceforth to be substituted for equal laws? Old men may placidly fold their hands and say to themselves, "Our work is accomplished, and we shall not be here when the coming cataclysm arrives"; but how are middle-aged men, and especially young men, to regard with equanimity the prospect of unrestrained legislation, based on the assumption that "everything belongs to society as a whole," that "the worker is not to be rewarded according to the importance of his industrial product," that "employers as such have no right to exist," and that "corporate properties"—built up by years of toil and sacrifice—"may be taken over by the people at their physical valuation"?

And what is to insure us against this legislation if the constitutional guarantees are swept away? What prospect have the young men of all classes, especially of the self-dependent classes, if some *imperium in imperio*, some purely voluntary and irresponsible organization within the State, is able to fill public offices with its candidates and through the control of legislative power impose its will upon every form of production, distribution, and consumption?

Is there any disposition tending in this direction? Is there any motive for pursuing it? Is there any power in existence, or likely to come into existence, that can assume full control of the various industries, dictate the hours and conditions of labor, the amount of the product, the agencies through which it shall be distributed, the rewards which each participant shall receive? If such a power came into being, what would be left of individual liberty, and what would be the value of each individual life? Would there be any open market in which a man might dispose of his own energies or his own wares at his own price? Would there be any possibility of existence except upon conditions laid down by the State, or by the *imperium in imperio* that controlled the State, or by the *junta* of persons permitted to wield the power in this machine within a machine?

What, then, becomes of the conception of society as a "living thing," of free citizenship, of personal liberty? And where is to be found the wisdom, the integrity, the

self-abnegation to give wholesome direction to this mechanism, composed of human beings fitted into wheels and pinions, and consumed to furnish its propelling power? Who would be responsible for that satisfaction of needs, that adjustment of capacities, that restraint of appetites, that stimulation of energies without which such a mechanism would be a mere lump of death?

And what, finally, would be the gain in such a state of human association, when each man proclaimed that the crusts remaining were "common property," withheld by their transient possessors from those who did not possess, with the cry, "We are taking that which is ours, for all is ours so long as there is a crumb!"

Only sporadically and occasionally, thanks to our traditions of respect for law and the constitutional system we have inherited, have we been afflicted with scenes of violence and open revolt, yet they have not been wholly wanting. But the spirit of revolt against the public order secured by our laws and their constitutional guarantees is frequently and very boldly expressed.

We want to get something for ourselves now, not for our grandchildren, said a paid propagandist of anti-constitutional principles in a public address recently in a Western city.

We can't accomplish much under our government [he continued], which is clumsy and impossible, almost hopeless. . . . Under it we can't pass any law of consequence interfering with vested rights. The Constitution, old, musty, and antiquated, is a barrier, with the Supreme Court all powerful. . . . We must get what we want by standing together. Do something radical.

Is there, then, no "crisis" in constitutionalism? Will the foes of the Constitution ultimately "get together"? It is not unlikely. Will its friends also get together? They will continue, perhaps, to group themselves about opposing standards chiefly concerned with minor matters, sometimes unconsciously allied with elements which they must finally disavow, until they perceive that a great menace to society has arisen. Then they will make haste to rally about the Constitution, as their fathers rallied about the Union when the gravity of a situation too long ignored compelled their attention. When will that be?

In the mean time is nothing to be done? The opposition to the Constitution is by no means attributable to the im-

portation of foreign blood. A high-school graduate, writing from a Western city, confides to me the change that he has experienced. He says:

My ancestors fought in 1776, in 1812, and in 1860-1865 for the establishment and defense of constitutional government. I entered the workaday world with a high regard for our Constitution and its guarantees and a deep and glowing patriotism. . . . I agree with you, sir, that a crisis is at hand in constitutionalism, and if those who still have faith in it will make some mighty concerted move to enforce its guarantees and fulfil its mandates of abstract righteousness, the situation may yet be saved; but for my part I do not think the number of those who honestly try to enforce constitutional guarantees is sufficient to warrant serious consideration. I, therefore, declare that I have no faith in either the Federal Constitution or its administrators, because neither it nor they secure me anything. . . . Could I do so, I would leave the flag and these hypocritical institutions before another day. . . . There is naught left for me to do save secretly to arm, if yet I may, and await the hour when a Francisco Villa shall arise on this side of the Rio Grande with the cry, "On to Washington!"

And what could possibly happen at Washington that would change this young man's state of mind, or the situation of which his frank expression is an index? What is needed is not so much anything to be done at Washington as something that might advantageously happen East, West, North, and South—a change in the attitude of men toward the idea of law and toward one another. It is always the individual who suffers. We cannot save or help him by any kind of mere class legislation. It is not to his advantage to make him dependent, to abridge his powers of self-help, or to take away his liberty of action so long as he does not injure others. We help him most when we leave him free to pass out of any class to which he may temporarily belong, when we inspire him with the idea of self-dependence, and when we secure to him the possession of what by his industry, skill, or enterprise he may honestly acquire. Let us help him, certainly, if he needs help; but not delude him with the error that more is rightly coming to him than he has ever earned, or frighten him with the dread that he can never come to his own. For sympathy, charity, good example, and unselfish public service there will always be room; but for the suppression of native powers, for public dictation based on arbitrary rules, for the assumption that society is more important than those who compose it, and for the expropriation of success for the relief of failure there is no place in a free republic.

DAVID JAYNE HILL.